APPENDIX

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STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

FILED SEP. 14, 1993
NO. 92CF 372

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner/Plaintiff,
vs.
CARL BURPO,
Respondent/Defendant

ORDER

This cause comes on to be heard on Defendant's Motion to Dismiss Counts 1, 5, 8, 11, 13, 17 and 19 of the Indictment, claiming 720 ILCS 5/12-13 & 5/12-18(b) violate the due process clause of the 14th Amendment of the U.S. Constitution and Article I, Sec. 2 of the Illinois Constitution; evidence presented; issues briefed and argued; and the Court being fully advised in the premises, FINDS:

1. This Court has jurisdiction of the parties and subject matter herein.

2. The Defendant has standing to contest the constitutionality of 720 ILCS 5/12-13 & 5/12-18(b). The allegations against Defendant arises in the context of his profession as a gynecologist. Under the general factual allegations of this case, he is directly affected as a gynecologist by the infirmity of these statutes.

3. The evidence is unrebutted that a gynecologic exam is a proprioceptive evaluation requiring intrusion of the patient constituting "sexual penetration" as defined in 720 ILCS 5/

12-12. "Sexual penetration" is the conduct proscribed in 720 ILCS 5/12-13. The statute does not further quality the proscribed conduct with a specified mental state.

4. The State concedes that the alleged victims consented to the gynecologic exams. The State theorizes that this consent was vitiated when Defendant's actions became inconsistent with "reasonable medical standards".

5. That 720 LICS 5/12-18(b) has been construed to create an exemption from liability under 720 ILCS 5/12-13 for an examination "consistent with reasonable medical standards . . . " See People v. Foster, 195 Ill. App. 3d 926 (5th Dist. 1990). Under Foster this is an exemption which must be proved by the Defendant by a preponderance of evidence.

6. The statutory scheme attempts to exempt or insulate persons who must perform the conduct proscribed by 720 ILCS 5/12-13 with the exemption in 720 ILCS 5/12-18(b). However, the phrase "consistent with reasonable medical standards . . . ", is unconstitutionally vague and overboard.

7. Due process requires that a criminal statute is "void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104 (1972). It must provide sufficient notice of forbidden conduct and provide ascertainable standards of guilt. People v. Welirein, 568 N.E. 2d 1 (1990). The flawed phrase does not pass due process muster. This record is replete with examples of criminally benign conduct which is inconsistent with "reasonable medical standards".

8. The State suggests that even if the phrase is infirm, it is not constitutionally fatal to the Criminal Sexual Assault Statute. The State suggests that you merely excise the malignancy under the Doctrine of Severability to preserve

the constitutional health of the statutory scheme. However, the phrase is the heart of the statutory scheme as applied to gynecologists and this particular Defendant. Any deviation from "reasonable medical standards" defeats the exemption and vitiates the consent. Due process does not abide a statutory scheme so vague and overboard in nature that its consequence is to expose a physician who performs a gynecologic exam negligently to liability for a Class I Felony.

9. The statutory scheme created by 720 ILCS 12-13 and 12-18(b) is unconstitutionally vague and overbroad as to the class of persons performing gynecologic exams including this Defendant.

WHEREFORE, based upon the foregoing this Court grants Defendant's Motion and dismisses Counts 1, 5, 8, 11, 13, 15, 17 and 19 of the Indictment.

ENTER:
/s/ Honorable James M. Radcliffe
HONORABLE JAMES M. RADCLIFFE

9/14/93

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62706

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035
February 17, 1995

The mandate of this Court will issue to the Appellate Court, Circuit Court or other Agency on March 17, 1995, unless a petition for rehearing (due March 10, 1995) or motion to stay the mandate is timely filed. Supreme Court Rule 368.

Filed
Filed 17, 1995
Supreme Court Clerk

Docket No. 76424 Agenda 12—September 1994.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,
v.
CARL BURPO, Appellee.

JUSTICE HEIPLE delivered the opinion of the court:

A St. Clair County grand jury indicted Carl Burpo, a medical doctor, for various sex offenses, including eight counts of criminal sexual assault in violation of section 12—13(a)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1991, ch. 38. par. 12—13(a)(2)). The eight criminal sexual assault counts arose from conduct that occurred while Dr. Burpo was performing gynecological examinations. Dr. Burpo moved to dismiss the charges, claiming that the legislative scheme which defines the offense. and the medical examination exception to it, make the statute void for vagueness. The circuit court granted Dr. Burpo's motion to dismiss, declaring the statutory scheme to be unconstitutionallv vague as to the class of persons performing gynecologic exams. including this defendant. The State now appeals. (134 Ill. 2d R. 603.) We reverse.

We first address the State's contention that defendant does not have standing. According to the State. defendant's arguments are based on hypothetical applications of the statute to punish innocent conduct for which defendant was not charged. Defendant's mere status as a gynecologist, the State contends. does not confer upon him the standing to challenge the statute on its face where the statute is capable of a valid application to him.

The State's contention is wrong. The defendant does not contest the constitutionality of the statute as a mere disinterested gynecologist who is concerned about the potential application of the statute. Rather. defendant contests the validity of a statute which has criminalized certain actions he took during several gynecological examinations. The facts of the case against the defendant directly implicate what he claims to be the statute's constitutional infirmity, that the standards set forth in the statute are unconstitutionallv vague as applied to him.

The statute provides that an accused commits criminal sexual assault if he commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent. It then sets forth an exception or exemption to the offense of aggravated criminal sexual assault: "Any medical examination or procedure which is conducted by a physician, nurse. medical or hospital personnel, parent, or caretaker for purposes of and in a manner consistent with reasonable medical standards is not an offense ***." Ill. Rev. Stat. 1991, ch. 38, par. 12—18(b).

Long accepted standards of statutory construction mandate that statutes are entitled to a presumption of constitutionality with the burden of establishing a constitutional violation resting upon the party challenging the statute. Moreover, if construction of a statute is doubtful, the doubt should be decided in favor of the law's validity. There is a further overriding principle of statutory construction that the court should ascertain and give effect to the intent of the legislature.

At the outset, it is important to establish what the State must prove in prosecuting a gynecologist under the statute. The defendant suggests that a physician commits acts which constitute criminal sexual assault in every gynecological examination he performs. Therefore, the defendant contends, once the physician is indicted for the crime of sexual assault, the burden

impermissibly shifts to the physician to establish by a preponderance of the evidence that he is entitled to the statutory medical exemption.

The defendant's construction of the statute is flawed. I-'Under the statute. the prosecution must prove not only the act of sexual penetration but also that the defendant new that the patient did not consent. The State contends, and we agree, that there is substantial interplay between the two sections. Specifically, subsumed within the sexual assault statute is the premise that the patient would only consent to an examination which was conducted pursuant to reasonable medical standards. When a gynecologist intentionally exceeds the scope of reasonable medical standards, the patient's consent is vitiated. and the physician may be prosecuted under the sexual assault statute. Therefore, the burden is on the State to establish beyond a reasonable doubt what the reasonable medical standards were, that the physician intentionally transgressed those standards, and that the patient did not consent to the transgressions.

The defendant's assertion that mere negligence can subject a gynecologist to prosecution for criminal sexual assault is baseless. The physician's good faith will protect him from criminal sanctions. In *People v. Terrell* (1989), 132 Ill. 2d 178, 207, the court found that the legislature eliminated acts of sexual penetration with innocent intentions from the purview of the aggravated criminal sexual assault statute. Consistent with the holding in Terrell, we find that, in prosecuting a gynecologist under the sexual assault statute, the State must prove that the gynecologist possessed a mental state of' intent, knowledge or recklessness.

Thus, gynecologists are not implicated under the sexual assault statute simply because they perform invasive physical examinations. The State bears the burden of proof, and the defendant may attempt to avail himself of the exception by either rebutting the State's evidence regarding reasonable medical

standards, rebutting the State's evidence concerning his mental state, or rebutting the State's evidence concerning the patient's consent.

Since determining the scope of consent in applying the sexual assault statute to gynecologists implicates the reasonable medical standards language in the exception to the statute. we next address the defendant's contention that the reasonable medical standards language implicated by the sexual assault statute is unconstitutionally vague.

A statute is said to violate due process under either the United States Constitution or the Illinois Constitution on the basis of vagueness only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. *(People u. Pembrock* (1976). 62 Ill. 2d 317, 322.) A statute will be considered unconstitutionally vague on its face only where it is incapable of any valid application in the sense that no standard of conduct is specified at all. *(People u. Haywood* (1987), 118 Ill. 2d 263, 270, quoting *Coates u. City of Cincinnati* (1971), 402 U.S. 611. 614. 29 L. Ed. 2d 214, 217, 91 S. Ct. 1686. 1688.) Further, due process requires that a statute must not be so vague that men of common intelligence must necessarily guess at its application or meaning. *(People u. Fabing* (1991), 143 Ill. 2d 48. 53.) Applying these principles to the present case, we find that the statute is sufficiently clear.

Criminal acts cannot always be defined with absolute precision. Laws criminalizing obscenity, for instance, are framed in general terms. However, they have withstood constitutional scrutiny. (See *People u. Ridens* (1974), 59 Ill. 2d 362.) Obscenity laws are necessarily flexible because they are based upon community standards which vary from place to place and may change over time.

Similarly, in civil medical malpractice actions. the testimony of experts is needed to establish the applicable standard of care. Medical standards are not amenable to precise and explicit statutory codification. This court has previously observed that medicine is not an exact science. It is rather a profession which involves the exercise of individual judgment within the framework of established procedures. Differences in opinion are consistent with the exercise of due care. *Walski u. Tiesenga (* 1978). 72 Ill. 2d 249, 261.

Therefore, the legislative use of the term "reasonable medical standards" is sufficient. Common sense must play a role in the construction of statutes. As this court observed in *Haywood:*

> "It cannot be presumed that the General Assembly, in legislating, intended obscurity, or 'to override common sense.' [Citations.] Furthermore. the defendants' interpretation is inconsistent with established principles of statutory construction. The statute should be given a construction that is consistent with the purposes and policies of the statute." *Haywood,* 118 Ill. 2d at 270.

Accordingly. we hold that the statutory scheme under consideration is constitutional. The judgment of the circuit court of St. Clair county dismissing the criminal sexual assault counts against the defendant is therefore reversed. The cause is remanded to the circuit court for further proceedings.

Reversed and remanded.

JUSTICE FREEMAN concurring:

I agree with the majority that defendant has standing to challenge the constitutionality of the legislative scheme and

that the scheme is also constitutionally sound. I take issue, however, with the majority's construction of the scheme's

individual provisions and the interplay between these two. I construe the provisions differently in keeping with rules of statutory construction and the obvious underlying legislative intent.

The trial court found disturbing the absence of a culpable mental state requirement in the aggravated criminal sexual assault statute, section 12—13(a)(2), and its medical examination exemption, section 12—18(b), as applied to gynecologists. This was because gynecologists commit acts of sexual penetration during routine vaginal examinations, thereby satisfying most of the statute's elements, including that of the mental state of nonspecific intent. (See *People v. Terrell* (1989), 132 Ill. 2d 178 (a mental state of either intent or knowledge implicitly is required for sexual penetration to occur).) According to the trial court and defendant, criminally charged gynecologists then impermissably bear the burden of proving their innocence in that their conduct was within the medical examination exemption. *i.e.*, that the examination was for "purposes and in a manner consistent with reasonable medical standards."

According to the trial court and defendant, the exemption, in operation with the sexual assault statute, as applied to persons performing gynecologic exams. is unconstitutionally vague. The scheme is allegedly unconstitutionally vague because it fails to clearly define the boundaries of criminal conduct for gynecologists performing vaginal examinations. According to defendant. the exemption 's phrase "consistent with reasonable medical standards is not a sufficient standard in the absence of any requirement of an unlawful purpose.

Responding to defendant's s suggestion that a physician's act in performing a vaginal examination constitutes the conduct of a criminal sexual assault under the statute, the majority unnecessarily and unwarrantedly forges an additional and unclear mental state element into the criminal sexual assault

statute. "When the defendant gynecologist *intentionally exceeds the scope of reasonable medical standards,* the patient's consent is vitiated, and the physician may be prosecuted under the sexual assault statute." (Emphasis added.) (Slip op. at 2.) Thus, according to the majority's reasoning, a negligent examination could not subject a physician to prosecution for criminal sexual assault, because "[c]onsistent with the holding in *Terrell,* we find that *** the State must prove that the gynecologist *possessed a mental state of intent,* knowledge, or recklessness." (Emphasis added.) Slip op. at 3.

Thus. by this construction, the aggravated criminal sexual assault statute, as applied to physicians conducting vaginal examinations. now appears to possess both the general intent requirement (see *Terrell,* 132 Ill. 2d at 209 (proof of an intentional or knowing act by the accused)) and this particular specific intent requirement (proof of the accused's intent to exceed the scope of reasonable medical standards). *(Cf. People v. Williams* (1989), 191 Ill. App. 3d 269, 275 (criminal sexual assault is a general intent offense).) I believe that inclusion within the statute of this particular specific intent element. applicable to this class of accuseds, offers no assistance to the clarity of the statutory scheme, nor is it warranted.

The majority is correct to point out that the defendant's interpretation of the statute is "flawed." as it fails to consider all of the statute's elements. especially that directed to the victim's consent. (Slip op. at 2 ("[u]nder the statute. the prosecution must not only prove the act of sexual penetration but also that the defendant knew that the patient did not consent").) A prosecution of an accused under section 12—13(a)(2) must prove both the accused's intentional act of penetration *and* knowledge of the; victim's inability to give kowing consent. The fact that the prosecution must also prove that the accused knew the victim could not consent refutes dependant's argument that a physician's performance of merely innocent or negligent acts will subject

him to prosecution. Intentional conduct alone is not sufficient; an element speaking to unlawful purpose is required under the statute.

But in prosecuting a physician who performs vaginal examinations. this court need not override or ignore these express statutory elements. If a female patient is undergoing a vaginal examination to which she has consented, and the examining physician performs it in manner which suggests that it is not a legitimate medical examination. she is unable, at that point in time and space, to give any knowing consent.

And the examining physician knows she was unable to do so because he did not give her advance warning, or an opportunity to consent, and the deed was swiftly done. Thus, under the express terms of the statute, to prosecute a physician who performed a vaginal examination, an intentional act of sexual penetration is required, as well as indication that the physician knew of the victim's inability to consent. (*See People* v. *Quinlan* (1992), 231 Ill. App. 3d 21, 25 (evidence that victim not equipped to know defendant's acts were not medical procedure, that acts were not medical procedure proved victim unable to understand nature of the acts, and other evidence proved defendant knew).) There is no need to deviate from these expressly stated statutory elements by judicially crafting an additional statutory element.

Furthermore, the particular specific intent element advanced by the majority ultimately turns on a medical reasonableness standard (intent to exceed reasonable medical standards) and lends no additional clarity to the parameters of criminal conduct under the scheme than that already provided by the exemption. In short, it is no more clear than the exemption itself.

More importantly, the introduction of this element within the statute itself also unnecessarily increases the State's burden of proof. The majority's construction essentially inverts the language of the medical examination exemption by changing

what was described there as an examination conducted "consistent" with reasonable medical standards to the intentional "exceed[ing]" of reasonable medical standards. Thus a factor the legislature clearly intended as comprising the exemption to the statute becomes, under the majority's construction. also an element of the crime, itself. "Therefore, the burden is on the State to establish beyond a reasonable doubt what the reasonable medical standards were. that the physician intentionally transgressed those standards, and that the patient did not consent to the transgressions." (Slip op. at 2-3. *Cf. People u. Ikpoh* (1993), 242 Ill. App. 3d 365, 383-84 (holding defendant bears burden of proof on issue of whether procedure was medical procedure and entitled to medical examination exemption from sexual abuse prosecution); *People v. Foster (* 1990), 195 Ill. App. 3d 926, 952 (holding that proof that defendant's acts were not reasonable medical examination is not an element of criminal sexual assault).) Thus, the majority's construction unnecessarily increases the burden of proof on the State since it is the State's burden to prove the elements of the crime beyond a reasonable doubt. and it is the defendant's burden to prove his entitlement to a statutory exemption by a preponderance of the evidence. The State is simply not required to negate an exemption. See *People v. Smith* (1978), 71 Ill. 2d 95, 105-09.

I agree with the majority and the State that there is substantial interplay between the statute and the exemption. Either party may raise the exemption and present evidence showing whether the acts were done in a manner consistent with reasonable medical standards (see *People v. Delk (* 1981), 96 Ill. App. 3d 891, 902) and some of this evidence may also go to whether the physician knew of the victim's inabilities to understand or give consent. However. I do not believe that it is helpful to blur the distinctions between the two provisions or their accepted operations for the sake of upholding the scheme. The scheme is constitutionally sound without such construction.

As mentioned previously, to prosecute a physician under the statute there must be more than a mere intentional vaginal examination. Under the statute, every gynecologist conducting vaginal examinations does not fall within the purview of the sexual assault statute. The physician must evidence an awareness that the victim was unable to understand or give consent. If charges are brought, the physician or the State may raise the medical examination exemption and present evidence that the examination was or was not conducted for "purposes" consistent with reasonable medical standards and accomplished in a like manner. (See *Terrell,* 132 Ill. 2d at 211 ("the legislature **x eliminate[d] acts of 'sexual penetration' with innocent intentions from the purview of the aggravated criminal sexual assault statute when it enacted [the exemption]").) Under these circumstances, a reasonableness standard. which suffices to define behavior in other areas of law. is not so amorphous as to render the scheme unconstitutionally vague.

JUSTICE HARRISON, dissenting:

Section 12—13(a)(2) of the Criminal Code of 1961 provides that an accused commits criminal sexual assault if All he or she "commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent." (Ill. Rev. Stat. 1991, ch. 38, par. 12—13(a)(2).) This provision is qualified by section 12—18(b) of the Code, which states that "[a]ny medical examination or procedure which is conducted by a physician. nurse, medical or hospital personnel, parent, or caretaker for purposes and in a manner consistent with reasonable medical standards is not an offense" within the meaning or section 12—13 or related provisions. Ill. Rev. Stat. 1991, ch. 38, par. 12—18(b).

There is no dispute that Dr. Burpo committed acts of "sexual penetration" within the meaning of section 12—13(a)(2) when he examined the eight complaining witnesses involved here. He

had to in order to do his job as a gynecologist. According to expert testimony presented at the hearing on the motion to dismiss, penetration is unavoidable during the course of a proper vaginal examination. To perform the exam, a doctor must insert his fingers, and sometimes an instrument known as a speculum, into the vagina,

Just as there is no dispute about the fact of sexual penetration, there is no dispute that all eight of the complaining witnesses consented to the examinations. One of the women received her exam on a follow-up visit after an abortion. A second was required by her insurance company to obtain a second opinion before she could have a hysterectomy, while a third was examined in order to get a prescription for birth control pills. How the other five came to see Dr. Burpo is not disclosed in the record. but the State does not contend that the circumstances surrounding their exams were anything but routine and proper.

In pursuing criminal sexual assault charges against Dr. Burpo, the State bases its case on the proposition that certain acts allegedly performed by Dr. Burpo in the course of his examinations had no "legitimate" medical purpose. The State's theory appears to be that the lack of medical "legitimacy" in Burpo's conduct is relevant to show that the consent initially given to the examinations was defeated. The State seems to assert that when the complaining witnesses consented to the exams, they expected that only "legitimate" procedures would be performed on them. To the extent that aspects of Dr. Burpo's examination were not "legitimate," they were unexpected, and the complaining witnesses were therefore "unable to give knowing consent" within the meaning of section 12—13(a)(2).

The State's approach has origins in precedent decided under the old rape laws, where force was implied "when the rape or deviate sexual acts proscribed by statute [were] accomplished under the pretext of medical treatment when the victim [was]

surprised, and unaware of the intention involved." (*People v. Borak* (1973), 13 Ill. App. 3d 815, 82021.) The idea was that if the complaining witness was surprised by the act and unaware of the assailant's intentions, she could not have given consent, and the act was therefore deemed to have been made with force. See *Borak,* 13 Ill. App. 3d at 821.

Force is clearly not an element of the offense under section 12—13(a)(2). Nevertheless, similar reasoning has been followed in applying that statute where, as here, the State charges that the complaining witness was "unable to give knowing consent." Although the statutory requirement that a victim be "unable to give knowing consent" would appear to be aimed at situations where the victim was asleep, unconscious. or suffering from some substantial mental impairment. the appellate court has extended it to also embrace situations where a medical professional tricked the complaining witness into submitting to sexual penetration on the ruse that it was part of a "legitimate" medical test when it was not. (See *People v. Quinlan* (4992). 231 Ill. App. 3d 21.) This is the standard the State would have us follow here.

Once medical "legitimacy" becomes the touchstone of a doctor's criminal liability as the State argues it should be, the question of whether a doctor's conduct comports with "reasonable medical standards" within the meaning of section 12—18(b) becomes dispositive. In the State's own words.

> "Evidence of the physician's compliance or noncompliance with reasonable medical standards is the only way in which a fact finder can determine whether the physician's conduct was good faith medical treatment or aggravated criminal sexual assault. '

Sections 12—13(a)(2) and 12—18(b) are thus inextricable under the State's theory. If. under the evidence, an examination

or procedure involving sexual penetration is not "consistent with reasonable medical standards" within the meaning of section 12—18(b), it cannot be regarded as "legitimate" and will therefore subject the defendant to conviction for violation of section 12—13(a)(2).

In the proceedings before the circuit court, Dr. Burpo argued and the court found that the legislative scheme created by the interplay of sections 12—13(a)(2) and 12—18(b) is void and unenforceable "as to the class of persons performing gynecologic exams including this Defendant" because the phrase "consistent with reasonable medical standards" is unconstitutionally vague. I agree.

The void-for-vagueness doctrine requires that a penal statute define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement. *(Kolender u. Lawson* (1983), 461 U.S. 362. 367, 76 L. Ed. 2d 903, 909, 103 S. Ct. 1856, 1868.) Although the doctrine focuses on both actual notice to citizens and arbitrary enforcement. the United States Supreme Court has recognized that the more important aspect of the vagueness doctrine

> " 'is not actual notice. but the other principal element of the doctrine the requirement that a legislature establish minimal guidelines to govern law enforcement.' [Citation.] Where the legislature fails to provide such minimal guidelines. a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender,* 461 Is'.S. at 359, 75 L. Ed. 2d at 909, 103 S. Ct. at 1868. quoting *Smith v. Goguen* (1974), 416 U.S. 566, 574-75. 39 L. Ed. 2d 606. 613, 94 S. Ct. 1242, 1248.

Vagueness challenges to statutes that do not involve first amendment freedoms must be examined in light of the facts of the case at hand. Normally, a facial vagueness challenge will be upheld only if the statute is impermissibly vague in all of its applications. *(Village of Hoffman Estates u. Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 496, 71 L. Ed. 2d 362, 369, 102 S. Ct. 1186. 1191.) The United States Supreme Court has also recognized, however, that the standard of precision required of a statute is higher where, as here, the statute imposes criminal penalties. That consideration has, at times, led the court "to invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Kolender,* 461 U.S. at 359 n.8, 75 L. Ed. 2d at 910 n.8, 103 S. Ct. at 1859 n.8.

A criminal statute is facially invalid where it vests in the police virtually complete discretion to determine whether the terms of the statute have been satisfied. (See *Kolander,* 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855.) In addition, this court has declared that a legislative enactment is void where its language appears on its face to have meaning, but where that language cannot possibly be given any precise meaning or intelligent application in the circumstances under which it is intended to operate. *Granite City Division of National Steel Co. u. Illinois Pollution Control Board* (1993), 155 Ill. 2d 149, 163-64; *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.* (1987), 118 Ill. 2d 389, 402.

Here, the statutory language "consistent with reasonable medical standards" is one of those phrases that appears to have a clearly ascertainable meaning, but. in this context. does not. This is not a situation where a doctor took advantage of the circumstances to have intercourse with his patients. All eight of the criminal sexual assault charges against Dr. Burpo arose from complaints regarding the manner in which he performed what were otherwise entirely routine internal exams.

Performing internal medical exams on female patients is a procedure subject to many variables. Techniques differ from doctor to doctor and from place to place. Expert testimony adduced in the trial court indicated that there is considerable variation in standards from one community to the next. Depending on the specific problems involved. a gynecologist in Chicago could be judged differently, in terms of "reasonable medical standards." from a gynecologist in Hillsboro. In addition, there can be disagreement on whether a gynecologist acted properly even among experts applying the same standards. For example. one of the instances of alleged misconduct by Burpo involved the length of time a vaginal examination took. A doctor called by the State during the grand jury proceedings opined that an internal exam would take about three minutes. The defense expert. however, stated that there was no average time for such an exam. In his words,

"it would be a terrible mistake to say it should be performed in three minutes or five minutes or seven minutes or nine minutes because it eliminates all of the variables that go into the exam."

In light of such profound disagreements. it is difficult to see how the statutory scheme before us could be construed as providing the clearly ascertainable standard of guilt that due process requires. The vagueness of the statutory standard is further compounded by the fact that the legislation subjects gynecologists to potential liability without regard to fault. (See *Colautti v. Franklin* (1979), 439 U.S. 379, 394, 58 L. Ed.

' 2d 596, 608, 99 S. Ct. 675, 685.) In a different context, this court has held that the statute does not punish "innocent" conduct in the sense that it requires an intentional or knowing act by the accused. *(People v. Terrell* (1989), 132 Ill. 2d 178, 209.) The problem in the case of gynecologists is that the "sexual penetration" that occurs in the course of a proper vaginal examination will always be knowing and intentional. When a doctor puts his

fingers into the patient's vagina. he most certainly means to do it. As previously discussed, it is an inherent and unavoidable part of the procedure.

Because the statute requires only intent or knowledge. and not any purpose of sexual gratification or arousal *(Terrell. 132* Ill. 2d at 210-11). any deviation from "reasonable medical standards" in the course of an internal exam could subject a gynecologist to prosecution. even if the deviation was the result of negligence. With respect to this aspect of the practice of gynecology, medical malpractice would be criminalized. Whether the conduct was motivated by a criminal purpose or not. punishment could result.

The abuses that might follow at the hands of an overzealous prosecutor are manifest. The situation is especially troubling when viewed in the context of the ongoing

~controversy over contraception and abortion rights. For a politically sensitive State's Attorney in a "pro-life" community, the threat of prosecution under sections 12—13(a)(2) and 12—18(b) could be a potent weapon in inhibiting the delivery of gynecological services to women who wish to exercise their constitutional right to reproductive freedom. While Dr. Burpo has refrained from charging the State's Attorney with such an improper purpose here, I cannot help but observe that at least some of the charges in this case arose from Dr. Burpo's work at a Planned Parenthood clinic.

The State is confident that common sense and fair play will prevail, but the validity of a law cannot be allowed to turn on the hope that prosecutors will have the wisdom and restraint to enforce it judiciously. As Justice Douglas reminded us more than 40 years ago, "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws,* not of *men."* (Emphasis in original.) *Joint Anti-Fascist*

Refugee Committee u. McGrath (1951), 341 U.S. 123, 177, 95 L. Ed. 817, 857, 71 S. Ct: 624, 651 (Douglas, J., concurring).

For the foregoing reasons, I would hold that the phrase "consistent with reasonable medical standards" renders the statutory scheme created by sections 12—13(a)(2) and 12—18(b) unconstitutionally vague and unenforceable in the context of internal exams performed by physicians on their female patients. The judgment of the circuit court of St. Clair county dismissing the criminal sexual assault counts against Dr. Burpo should therefore be affirmed.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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April 3, 1995

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No. 76424 - People State of Illinois, appellant, v. Carl Burpo, appellee. Appeal, Circuit Court (St. Clair).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 13, 1995.

ILLINOIS COMPILED STATUTES 1994 CRIMINAL OFFENSES

5/12-12. Definitions

§ 12-12. Definitions. For the purposes of Sections 12-13 through 12-18 of this code, the terms used in these Sections shall have the following meanings ascribed to them:

(a) "Accused" means a person accused of an offense prohibited by Sections 12-13, 12-14, 12-15 or 12-16 of this Code or a person for whose conduct the accused is legally responsible under Article 5 of this Code.

(b) "Bodily harm" means physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy and impotence.

(c) "Family member" means a parent, grandparent, or child, whether by whole blood, half-blood, or adoption and includes a step-grandparent, step-parent or step-child. "Family member" also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child continuously for at least one year.

(d) "Force or threat of force" means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:

(1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat: or

(2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.

(e) "Sexual conduct" means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused.

(f) "Sexual penetration" means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.

(g) "Victim" means a person alleging to have been subjected to an offence prohibited by Sections 12-13, 12-14, 12-15 or 12-16 of this Code.

Laws 1961, p. 1983, § 12-12, added by P.A. 83-1067, § 1, eff. July 1, 1984. Amended by P.A. 83-1117. §1. eff. July 1, 1984: P.A. 88-167, § 5, eff. Jan. 1, 1994.

Formerly Ill.Rev.Stat.1991, ch. 38 12-12.

Section 53 of P.A. 83-1067 provided:

"Saving clause, construction. The abolition of any offense by this Act does not affect any prosecution pending, penalty, punishment, disqualification from office or employment forfeiture incurred, or rights, powers or remedies accrued under any law in effect immediately prior to the effective date of this amendatory Act of 1983, which related to the abolished offense. The provisions of this amendatory Act insofar as they are the same or substantially the same as those of any prior statute, shall be construed as a continuation of such prior statute and not as a new enactment.

"This amendatory Act of 1983 shall only apply to those persons who commit offenses prohibited under Sections 12-13 through 12-16 of the Criminal Code of ? amended on or after the effective date of this amendatory Act.

ILLINOIS COMPILED STATUTES 1994

CRIMINAL OFFENSES

5/12-13. Criminal sexual assault

§ 12-13. Criminal Sexual Assault. (a) The accused commits criminal sexual assault if he or she:

(1) commits an act of sexual penetration by use of force or threat of force; or

(2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or

(3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or

(4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

(b) Sentence. Criminal sexual assault is a Class 1 felony. A second or subsequent conviction for a violation of this Section or under any similar statute of this State or any other state for any offense involving criminal sexual assault that is substantially equivalent to or more serious than the sexual assault prohibited under this Section is a Class X felony. When a person has any such prior conviction, the information or indictment charging

that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a Class X felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

Laws 1961, p. 1983. § 12-13, added by P.A. 83-1067, § 1. eff. July 1, 1984. Amended by P.A. 83-1117, § 1, eff. July 1, 1984: P.A. 85-837, § 2, eff. Jan. 1, 1988: P.A. 85-1030, § 2. eff. July 1, 1988: P.A. 85-1209, Art. II, § 2-23, eff. Aug. 30, 1988: P.A. 85-1440. Art. II, § 2-9, eff. Feb. 1, 1989.

Formerly Ill.Rev.Stat. 1991, ch. 38, ¶ 12-13.

P.A. 85-1003, § 1. which amended this section eff. July 1, 1988, was repealed by P.A. 85-1030. § 1. eff. June 30, 1988.

P.A. 85-1209, the First 1988 Revisory Act. provides in Art. II for the nonsubstantive revision or renumbering or repeal of certain sections of Acts of the 85 General Assembly through P.A. 85-1014, and corrects errors, revises cross-references and deletes obsolete text in such sections.

P.A. 85-1440. the First 1989 Revisory Act provides in Art. II for the nonsubstantive revision, renumbering, repeal or rerepeal of certain Acts both amended and repealed by Acts of the 85th General Assembly and, where successor laws have been enacted, incorporates such amendments into successor laws, and corrects errors, revises, cross-references and deletes obsolete text in such sections contained in P.A. 85-1015 through P.A. 85-1427.

5/12-18. General provisions

§ 12-18. General Provisions.

(a) No person accused of violating Sections 12-13, 12-14, 12-15 or 12-16 of this Code shall be presumed to be incapable of

committing an offense prohibited by Sections 12-13, 12-14, 12-15 or 12-16 of this Code because of age, physical condition or relationship to the victim, except as otherwise provided in subsection (c) of this Section. Nothing in this Section shall be construed to modify or abrogate the affirmative defense of infancy under Section 6-1 of this Code or the provisions of Section 5-4 of the Juvenile Court Act of 1987.[1]

(b) Any medical examination or procedure which is conducted by a physician, nurse, medical or hospital personnel, parent, or caretaker for purposes and in a manner consistent with reasonable medical standards is not an offense under Sections 12-13, 12-14, 12-15 and 12-16 of this Code.

(c) Prosecution of a spouse of a victim under this subsection for any violation by the victim's spouse of Section 12-13, 12-14, 12-15 or 12-16 of this Code is barred unless the victim reported such offense to a law enforcement agency or the State's Attorney's office within 30 days after the offense was committed, except when the court finds good cause for the delay.

(d) In addition to the sentences provided for in Section 12-13, 12-14, 12-15 and 12-16 of the Criminal Code of 1961 [2] the Court may order any person who is convicted of violating any of those Sections to meet all or any portion of the financial obligations of treatment, including but not limited to medical, psychiatric, rehabilitative or psychological treatment, prescribed for the victim or victims of the offense.

(e) After a finding at a preliminary hearing that there is probable cause to believe that an accused has committed a violation of Section 12-13 or 12-14 of this Code, or after an indictment is returned charging an accused with a violation of

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[1]705 ILCS 405/5-4.

[2]720 ILCS 5/12-13, 5/12-14, 5/12-15 and 5/12-16.

Section 12-13 and 12-14 of this Code, at the request of the person who was the victim of the violation of Section 12-13 or 12-14, the prosecuting State's attorney shall seek an order from the court to compel the accused to be tested for infection with human immunodeficiency virus (HIV). The medical test shall be performed only by appropriately licensed medical practitioners, and shall consist of an enzyme-linked immunosorbent assay (ELISA) test, or such other test as may be approved by the Illinois Department of Public Health; in the event of a positive result, the Western Blot Assay or a more reliable confirmatory test shall be administered. The results of the test shall be kept strictly confidential by all medical personnel involved in the testing and must by personally delivered in a sealed envelope to the victim and to the judge who entered the order, for the judge's inspection in camera. Acting in accordance with the best interests of the victim and the public, the judge shall have the discretion to determine to whom, if anyone, the result of the testing may be revealed; however, in no case shall the identity of the victim be disclosed. The court shall order that the cost of the test shall be paid by the county, and may be taxed as costs against the accused if convicted.

Laws 1961, p. 1983, § 12-18, added by P.A. 83-1067, § 1, eff. July 1, 1984. Amended by P.A. 83-1117, § 1, eff. July 1, 1984; P.A. 85-688, § 1, eff. Jan. 1988; P.A. 85-1209, Art. Ill., § 3-30, eff. Aug. 30, 1988; P.A. 86-770, § 1, eff. Jan. 1, 1990; P.A. 87-763, § 1, eff. Oct. 4, 1991; P.A. 88-421, § 5, eff. Jan. 1, 1994.

Formerly Ill.Rev.Stat. 1991, ch. 38 ¶ 12-18.